A **PAULINE CHAI SIEW PHIN**

v.

KHOO KAY PENG

B COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-02(IM)-2764-12-2013]
C 22 APRIL 2014

FAMILY LAW: *Divorce - Proceedings for - Wife instituted divorce proceedings in English High Court - Husband applied to Malaysian High Court that he be at liberty to petition for divorce without referring to*
D *conciliatory body - Whether Malaysian Court 'clearly inappropriate forum' in context of pending English Court proceedings by wife - Whether proceedings in Malaysia oppressive to wife*

CIVIL PROCEDURE: *Jurisdiction - Divorce proceedings - Wife*
E *instituted divorce proceedings in English High Court - Husband applied to Malaysian High Court that he be at liberty to petition for divorce without referring to conciliatory body - Whether Malaysian High Court more appropriate forum - Forum non conveniens - Whether appropriate test to be applied - Whether 'clearly inappropriate forum' test should be*
F *used - Burden of proof*

CIVIL PROCEDURE: *Stay of proceedings - Application for - Wife filed for proceedings in husband's application to be stayed pending hearing and disposal of petition for divorce by English High Court - Affidavit gave rise to many disputes of facts and law - Whether full trial necessary*
G *to determine issues of jurisdiction and domicile - Whether judge should deliberate on case by way of affidavit evidence - Whether full trial necessary to determine issues of jurisdiction and domicile - Whether case to be remitted to High Court before another judge*

H The appellant ('the wife') instituted divorce proceedings between the parties in the English High Court. The respondent ('the husband'), who was served with the English petition, lodged an acknowledgement of service and contested jurisdiction of the English High Court. The husband also filed encl. 1 in the
I Malaysian High Court for, *inter alia*, exemption from the requirement for reference to a conciliatory body under

s. 106(1) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). The wife filed encl. 6 which was an application for all the proceedings in encl. 1 to be stayed pending the hearing and disposal of petition for divorce by the High Court of Justice (Family Division) of England. The Malaysian High Court, after hearing both enclosures together, had allowed encl. 1 and dismissed encl. 6. The judge in dealing with encl. 1 applied the '*forum non conveniens*' test and found the more appropriate forum to be the Malaysian High Court and hence dismissed encl. 6. The judge further relied on the affidavit evidence filed and made findings that the Malaysian High Court had jurisdiction over the matrimonial proceedings between the parties and that the domicile of wife in law was that of Malaysia. The husband then filed a petition for divorce in the Malaysian High Court. The wife applied for stay of the judge's decision, which was rejected by the High Court, resulting in an appeal to this court. The issues that arose were (i) whether the Malaysian court was a 'clearly inappropriate forum', particularly in the context of pending English proceedings by the wife; (ii) whether the judge had erred when she determined the issues of jurisdiction of the Malaysian court and domicile of the parties while considering encl. 6 when such determinations were not required at all to dispose off encl. 6; (iii) whether the judge had erred when she determined the issues of jurisdiction of the Malaysian court and domicile of the parties by way of affidavit evidence when there were substantial disputes arising therefrom.

Held (allowing appeal in respect of encl. 1; dismissing appeal in respect of encl. 6)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The '*forum non conveniens*' test is more appropriate when dealing with a situation when the two competing forums have undoubted jurisdiction over the litigation. The '*forum non conveniens*' test presupposes that the two forums have such jurisdiction which was not the case here. The question of which was the more appropriate forum does not arise when one forum is not seized with jurisdiction. Under the circumstances, the 'clearly inappropriate forum' test should be used. (para 34)

A **(2)** It was beholden upon this court to determine whether or not a court, in this case the Malaysian court, was a 'clearly inappropriate forum' particularly in the context of pending English proceedings by the wife. To establish that, the burden of proof lay on the wife. (para 35)

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(3) It was hardly disputed that the husband's business was mainly based in Malaysia with directorship in several public listed companies. The proceedings before the two courts concerned division of properties and maintenance of the wife. A C substantial amount of documentary evidence required to prove the wife's claim was situated in Malaysia. Similarly, substantial number of witnesses concerning the financial affairs of the husband would also be from Malaysia. There was no assertion by the wife that proceedings in Malaysia would be oppressive D to her in that she would be seriously and unfairly handicapped. Accordingly, there was no reason to disturb the judge's refusing to stay proceedings in encl. 1. (paras 36 & 37)

(4) In determining encl. 6, there was no necessity to resolve the jurisdiction and domicile issues. The two enclosures should not E have been heard together. By doing so, the judge may have been misled into believing that the resolution of the aforesaid issues were required bearing in mind that submissions by counsel on both enclosures were made simultaneously. The judge should have embarked on a full trial to determine the F jurisdiction and domicile issues on the ground that the affidavit evidence gave rise to many disputes of facts and law. A full trial was necessary to determine the issues of jurisdiction and domicile. As a general rule, unless it was crystal clear that the factual matrix required for determination of an issue or issues G at hand was undisputed, the court must not resolve the dispute by affidavit evidence and must embark on a full trial with opportunities to both sides to cross examine the witnesses' averments in the affidavits. (paras 39, 40 & 43)

H **(5)** Apart from factual disputes, there were also legal issues which merit comprehensive considerations by counsel and court. The judge should not have deliberated on encl. 1 by way of the affidavit evidence but by way of a full trial where parties were subject to cross examination. Enclosure 1 was to be remitted I to High Court before another judge to be tried by way of a full trial. The judge's finding on the issues of jurisdiction and domicile should be set aside. (paras 50, 54 & 55)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('isteri') memulakan proses perceraian antara pihak-pihak terlibat di Mahkamah Tinggi England. Responden ('suami') yang telah disampaikan dengan petisyen Inggeris, membuat suatu pengakuterimaan penyampaian dan mencabar bidang kuasa Mahkamah Inggeris. Suami memfailkan lampiran 1 di Mahkamah Tinggi Malaysia, antara lain, bagi pengecualian daripada keperluan untuk rujukan kepada satu badan pendamai di bawah s. 106(1) Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 ('Akta'). Isteri telah memfailkan lampiran 6 iaitu permohonan untuk penangguhan segala prosiding dalam lampiran 1 sementara menunggu perbicaraan dan pelupusan petisyen perceraian oleh Mahkamah Tinggi Keadilan (Bahagian Keluarga) England. Mahkamah Tinggi Malaysia, selepas mendengar kedua-dua lampiran tersebut secara serentak, telah membenarkan lampiran 1 dan menolak lampiran 6. Dalam menangani lampiran 1, hakim telah menggunapakai ujian '*forum non conveniens*' dan mendapati forum yang lebih sesuai adalah Mahkamah Tinggi Malaysia dan dengan itu menolak lampiran 6. Hakim juga telah bergantung kepada keterangan afidavit yang telah difailkan dan membuat dapatan bahawa Mahkamah Tinggi Malaysia mempunyai bidang kuasa ke atas prosiding hal ehwal perkahwinan antara pihak-pihak terlibat dan domisil isteri dari segi undang-undang adalah di Malaysia. Suami telah memfailkan petisyen perceraian di Mahkamah Tinggi Malaysia. Isteri memohon agar keputusan hakim ditangguhkan, tetapi ia telah ditolak oleh Mahkamah Tinggi, membawa kepada rayuan ke mahkamah ini. Isu-isu yang timbul adalah (i) sama ada Mahkamah Malaysia adalah 'forum yang jelas tidak sesuai', terutamanya dalam konteks sementara menunggu prosiding Inggeris oleh isteri; (ii) sama ada hakim terkhilaf dalam memutuskan isu bidang kuasa mahkamah Malaysia dan domisil pihak-pihak terlibat semasa mempertimbangkan lampiran 6 apabila pemutusan itu tidak diperlukan untuk melupuskan lampiran 6; (iii) sama ada hakim terkhilaf apabila memutuskan isu bidang kuasa mahkamah Malaysia dan domisil pihak-pihak terlibat melalui keterangan afidavit apabila terdapat pertikaian besar yang timbul daripadanya.

Diputuskan (membenarkan rayuan terhadap lampiran 1; menolak rayuan terhadap lampiran 6)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Ujian '*forum non conveniens*' adalah lebih sesuai apabila menangani situasi di mana dua forum yang bersaing mempunyai bidang kuasa yang tidak diragui ke atas litigasi. Ujian '*forum non conveniens*' mengandaikan bahawa kedua-dua forum mempunyai bidang kuasa dan ini bukanlah kes di sini. Persoalan forum yang lebih sesuai tidak timbul apabila satu forum tidak mempunyai bidang kuasa. Dalam keadaan sebegini, ujian 'forum yang jelas tidak sesuai' sepatutnya digunakan.

(2) Ia adalah tanggungjawab mahkamah ini untuk memutuskan sama ada mahkamah, dalam kes ini mahkamah Malaysia, adalah 'forum yang dengan jelas tidak sesuai' terutama sekali dalam konteks sementara menunggu prosiding Inggeris oleh isteri. Untuk membuktikannya, beban pembuktikan terletak pada isteri.

(3) Tidak dipertikaikan bahawa perniagaan suami sebahagian besarnya bertapak di Malaysia di mana dia menjadi pengarah untuk beberapa syarikat tersenarai awam. Prosiding di kedua-dua mahkamah adalah berkenaan pembahagian harta dan nafkah isteri. Sebilangan besar keterangan dokumen berkenaan hal ehwal kewangan suami juga berada di Malaysia. Begitu juga, sebilangan besar saksi-saksi yang berkenaan dengan hal ehwal kewangan suami juga adalah dari Malaysia. Tiada tuntutan oleh isteri bahawa prosiding di Malaysia akan menindasnya dan membataskan dirinya. Sewajarnya, tiada sebab untuk mengganggu keputusan hakim menolak penangguhan prosiding dalam lampiran 1.

(4) Dalam memutuskan lampiran 6, tiada sebab untuk menyelesaikan isu-isu bidang kuasa dan domisil. Kedua-dua lampiran tersebut tidak sepatutnya didengar bersama. Dengan berbuat demikian, hakim mungkin tersalah arah dalam memutuskan bahawa penyelesaian isu-isu tersebut diperlukan dengan mengambil kira bahawa hujahan peguam ke atas kedua-dua lampiran tersebut telah dibuat pada masa yang

sama. Hakim sepatutnya memulakan perbicaraan penuh untuk memutuskan isu-isu bidang kuasa dan domisil atas alasan bahawa keterangan afidavit menimbulkan beberapa pertikaian fakta dan undang-undang. Perbicaraan penuh diperlukan untuk memutuskan isu-isu bidang kuasa dan domisil. Sebagai peraturan umum, melainkan jika ia adalah jelas bahawa matriks fakta yang diperlukan untuk memutuskan isu atau isu-isu yang berbangkit tidak perlu dipersoalkan, mahkamah tidak sepatutnya menyelesaikan pertikaian itu melalui keterangan afidavit dan seharusnya memulakan perbicaraan penuh dengan memberi peluang kepada kedua-dua belah pihak untuk memeriksa balas penyataan-penyataan saksi dalam afidavit.

(5) Selain daripada pertikaian fakta, terdapat juga isu undang-undang yang mewajarkan pertimbangan-pertimbangan komprehensif oleh peguam dan mahkamah. Hakim tidak sepatutnya mempertimbangkan lampiran 1 melalui keterangan afidavit tetapi melalui perbicaraan penuh di mana pihak-pihak terlibat tertakluk kepada soal balas. Lampiran 1 akan dikembalikan semula kepada Mahkamah Tinggi di hadapan hakim yang lain untuk dibicarakan melalui perbicaraan penuh. Dapatan hakim atas isu-isu bidang kuasa dan domisil harus diketepikan.

Case(s) referred to:

American Express Bank Ltd v. Mohamed Taufic Al-Ozeir & Anor [1995] 1 273 SC ***(dist)***

De Dampierre v. de Dampierre [1988] 1 AC 92 ***(refd)***

Gray (orse Formosa v. Formosa) [1963] P 259 EWCA ***(refd)***

Henry v. Henry [1996] 185 CLR 571 ***(refd)***

Oceanic Sun Line Special Shipping Co Inc v. Fay [1988] 165 CLR 197 ***(refd)***

Re S v. S (Matrimonial Proceedings Appropriate Forum) [1997] 1 WLR 1200 ***(refd)***

Spiliada Maritime Corporation v. Cansulex Ltd [1987] 1 AC 460 ***(refd)***

Syed Ibrahim Syed Abdul Rahman v. Liew Su Chin (F) [1983] 1 LNS 45 FC ***(refd)***

Voth v. Manildra Flour Mills Pty Ltd [1990] 171 CLR 538 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)

Rules of Court 2012, O. 2, O. 28 rr. 3B(1), (2)

Law Reform (Marriage and Divorce) Act 1976, ss. 48, 53, 106(1)

A *For the appellant - Malik Imtiaz Sarwar (K Shanmuga, Pavendeep Singh & Chan Wei June with him); M/s Kanesalingam & Co*
For the respondent - YN Foo (Kiran Dhaliwal & G Shantini with her); M/s YN Foo & Partners

B *[Editor's note: For the High Court judgment, please see KKP v. PCSP [2014] 8 CLJ 626.]*

Reported by Suhainah Wahiduddin

C

JUDGMENT

David Wong Dak Wah JCA:

Introduction

D **[1]** The appellant (wife) instituted divorce proceedings between the parties by filing in the English High Court on 14 February 2013 and on 18 February 2013 the wife obtained an *ex parte* non-molestation and occupation against the husband allowing her sole occupation of Rossway house and preventing the husband from
E going 50 metres of Rossway House.

[2] The respondent (husband) was served with the English Petition on 18 February 2013 at 6pm. On 25 February 2013 the wife amended the petition and this was served on 27 February
F 2013. The husband lodged an acknowledgement of service to the petition on 27 February 2013 and contests jurisdiction of the English High Court. On the same day, the husband files encl. 1 in the Malaysian High Court on the same day.

G **[3]** Enclosure 1 is the husband's *ex parte* application for the following terms:

(i) That the husband be exempted from the requirement for reference to a conciliatory body under s. 106(1) of the Law Reform (Marriage and Divorce) Act 1976 (LRA);

H

(ii) That the husband be at liberty to petition for a divorce under s. 53 of the Act without first having to refer the matrimonial difficulty to a conciliatory body.

I **[4]** The wife became aware of encl. 1 when she was served an acknowledgement of service to the amended petition on 4 March 2013. However due to the inability to extract information of

encl. 1 and only after obtaining all the relevant information, the wife on 3 May 2013 filed in encl. 6 which is an application for all the proceedings in encl. 1 be stayed pending the hearing and disposal of Petition for Divorce Case No. FD13D00747 by the High Court of Justice (Family Division) of England.

[5] The English High Court on 5 March 2013 directed that the issue of jurisdiction of the courts of England be tried on 8 July 2014 to 10 July 2014 in view of the husband's application to strike out the amended petition. However in view of the consent from both sides, the jurisdiction issue was then adjourned to be heard in October 2014.

[6] On 24 June 2013, the wife applied for leave to issue a second petition which the husband objected to. This application was part heard before Mr Justice Coleridge on 4 July 2013 and scheduled to resume on 30 April 2014.

[7] On 8 November 2013, the High Court of Kuala Lumpur heard both encls. 1 and 6 together and on 11 December 2013 at 11am the learned judge dismissed encl. 6 and allowed encl. 1 on terms therein. The husband at 12.27pm on the same day filed in a petition for divorce in the High Court of Malaya.

[8] The wife applied for stay of the learned judge's decision of 11 December 2013 and was rejected by the High Court on 22 January 2014 resulting to an appeal to this court which we on 11 March 2014 dismissed the same on the ground that no special circumstances has been shown to us by the wife.

[9] Before us now is the appeal proper against the decision of the High Court on encls. 6 and 1.

High Court Decision And Grounds

Enclosure 6

[10] To recap, the wife in this application sought to stay encl. 1 which is the husband's attempt to start divorce proceedings in the High Court of Malaya so that the English proceedings for divorce which was filed earlier than encl. 1 can be disposed off first. It is also the contention of the wife that encl. 1 is an abuse of the process of court aimed to undermine the proceedings in England.

[11] The learned judge in dealing with encl. 1 applied what we call the '*forum non conveniens*' test as expounded in *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] 1 AC 460 and has been applied in Malaysia by the Supreme Court in *American Express Bank Ltd v. Mohamed Taufic Al-Ozeir & Anor* [1995] 1 273; [1995] 1 MLJ 160.

[12] Applying the aforesaid test, the learned judge found the more appropriate forum to be in High Court of Malaya and hence dismissed encl. 6. Apart from that finding, the learned judge, relying on the affidavit evidence filed, made findings that the High Court of Malaya has jurisdiction over the matrimonial proceedings between the parties and that the domicile of wife in law is that of Malaysia. Having so held the learned judge proceeded to hear encl. 1.

Enclosure 1

[13] The learned judge found as a fact that there was indeed no chance of reconciliation between the parties. One of her grounds is that the wife had filed for divorce in England evincing also an inference that there is neither any chance of reconciliation or returning from England for the reconciliation. In fact when counsel for the wife was asked by this court whether she is disputing that the marriage is beyond the point of reconciliation, the reply was in the negative.

[14] Premised on her finding, the learned judge allowed encl. 1.

[15] Before we deal with submissions from respective counsel, it would be appropriate to set out the historical background of the relationship of the parties.

Historical Background

[16] The following are brief relevant historical matters which are uncontroversial.

[17] The parties were born in Malaysia and married in Malaysia at St Michael's Church, Ipoh, Perak on 5 December 1970.

[18] They have five children from the marriage, all of whom are over 18. The first three children were born in Malaysia while the last two were born in Perth.

[19] In 1982, the family moved to Perth, Australia. The husband continued to reside in Malaysia and travelled between Perth and Malaysia.

[20] The family in 1989/1990 moved to Canada. The wife remained with the children in Canada while the husband commuted between Malaysia and Canada to take care of his business connections in Malaysia. The wife and children continued to return to Malaysia and when they did they stayed at their house in Kuala Lumpur.

[21] The marriage was going through difficult times in 1993 resulting attempts being made to resolve their differences in Malaysia.

[22] In 1997, the husband's company Malaysia United Industries Berhad (MUI) bought a substantial share in Laura Ashley PLC. This acquisition resulted in the husband being a frequent traveller to England which the wife had accompanied him on many of these trips.

[23] In 2000, one of the husband's companies bought a piece of real estate in England called Rossway Park as an investment and a residence for the trips to England.

[24] In December 2008 the husband suffered a stroke and the wife returned to Malaysia to look after him.

[25] In October 2012, the parties went to England but a week after their arrival, the husband left with the wife remaining in England. She since then resides in England till now.

[26] The wife is a citizen of Australia and Canada. She travels on an Australian passport.

Our Grounds Of Decision

The Application Of The Wife For A Stay Of Proceedings - Enclosure 6

[27] Learned counsel for the husband contends that the correct test in an application for stay of proceedings of this nature is that espoused in celebrated case of *Spiliada Maritime Corp v. Cansulax Ltd (The Spiliada)* [1987] 1 AC 460, where applications for stay are premised on ground of '*forum non conveniens*'. This test has been adopted by our Supreme Court in *American Express Bank Ltd v. Mohamed Taufic Al-Ozeir & Anor* [1995] 1 273; [1995] 1 MLJ 160.

[28] Learned counsel for the husband sets out the guidelines in which one should approach this issue as follows:

1.1 that the fundamental principle applicable is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that "there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice";

1.2 that the word "*conveniens*" in *forum non conveniens* means suitability or appropriateness of the relevant jurisdiction and not one of convenience. Citing Lord Goff, Peh Swee Chin FCJ said:

> Lord Goff cautioned that the word '*conveniens*' in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience;

1.3 that the burden of proof is on the Defendant ie, the Appellant Wife herein to satisfy the court the other forum is more appropriate than the Malaysian forum. Citing Lord Templeman, His Lordship Peh Swee Chin said:

> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the court that 'some other forum is more appropriate' per Lord Templeman in *The Spiliada*;

1.4 Our Supreme Court singled out the following two considerations for special mention and emphasis:

(a) Whether it would be unjust to the Plaintiff (the Respondent Husband herein) to confine him to remedies elsewhere:

> it will be obligatory for a Malaysian court to consider in any event, a most important factor, ie, whether 'it would be unjust to the Plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with *forum non conveniens*;

(b) which is the forum with which the action has the most real and substantial connection:

> The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian court ought to consider in

> applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection.

[29] Learned counsel for the wife however submits that the test should be that adopted in the Australia jurisdiction which is the 'clearly inappropriate test'. This test emanates from two Australian High Court decisions in *Oceanic Sun Line Special Shipping Co Inc v. Fay* [1988] 165 CLR 197 and *Voth v. Manildra Flour Mills Pty Ltd* [1990] 171 CLR 538. In *Voth*, the High Court (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ, Toohey J dissenting in this respect) adopted the statement of principle espoused by Deane J in *Oceanic Sun Line* which is this:

> ... it is possible to identify in summary form what I see as the modern content of the traditional principles governing the power of a court in this country to order that proceedings which have been regularly instituted within jurisdiction should be dismissed or stayed on inappropriate forum grounds. That power is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgment and, to a significant extent, matters of impression. The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose jurisdiction the defendant is amenable and which would entertain the particular proceedings at the suit of the plaintiff. Otherwise, that onus will ordinarily be discharged by a defendant who applies promptly for a stay or dismissal if he persuades the local court that, having regard to the circumstances of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties.

[30] The difference between the two tests is set out by Brennan CJ in *Henry v. Henry* [1996] 185 CLR 571 as follows:

> 9. In *Voth*, the consensus which adopted the "clearly inappropriate" test drew a distinction between that test and the test

of "clearly more appropriate forum" adopted in *Spiliada*. The difference in approach in the two tests was stated by the majority in these terms (12):

> The 'clearly inappropriate forum' test is similar to and, for that reason, is likely to yield the same result as the 'more appropriate forum' test in the majority of cases. The difference between the two tests will be of critical significance only in those cases - probably rare - in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one. But the question which the former test presents is slightly different in that it focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums.

If a distinction between the two tests is to be preserved, it is necessary to focus precisely on the essential issue, namely, "on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum" - in this case, in the Family Court. It is impermissible to resolve the question by holding that only one court should exercise the jurisdiction to determine the proceedings, that a foreign court is the appropriate forum or the more appropriate forum, and thus to conclude that the selected forum is a clearly inappropriate forum. Reduced to its fundamentals, that is the appellant's argument in the present case, but it is inconsistent with the majority judgment in *Voth* (13) and the judicial consensus that was there achieved.

[31] In *Henry v. Henry (supra)*, the High Court of Australia sets out a non exhaustive list of factors which courts need to consider for the 'clearly inappropriate test':

Considerations relevant to a stay of proceedings between husband and wife with respect to their marital relationship:

> 39. Some of the matters properly to be taken into account in a case such as the present emerge from what has already been written. To start with, no question arises unless the courts of the respective countries have jurisdiction with respect to the parties and their marriage. And if there is a question as to the jurisdiction of the foreign court, it may be necessary to adjourn the local proceedings to enable the foreign court to determine that question. However, if both have jurisdiction, it will be relevant to consider whether each will recognize the other's

> orders and decrees. If the orders of the foreign court will not be recognised in Australia, that will ordinarily dispose of any suggestion that the local proceedings should not continue. However, if the orders of the foreign court will be recognized in Australia, it will be relevant to consider whether any orders may need to be enforced in other countries and, if so, the relative ease with which that can be done (50). As well, it will be relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy.
>
> 40. Other considerations include the order in which the proceedings were instituted, the stage which they have reached and the costs that have been incurred. It will also be relevant to consider the connection of the parties and their marriage with each of the jurisdictions and to have regard to the issues on which relief might depend in those jurisdictions. Moreover, it will be relevant to consider whether, having regard to their resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing. The list is not exhaustive. Rather, the question whether Australia is a clearly inappropriate forum is one that depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved.

[32] We note that the *Spiliada* case does not concern matrimonial matters though admittedly that test has been applied in matrimonial matters in England. And also the *American Express Bank* case, the facts there are not similar to the case here in that there is no parallel proceedings as it is here. Further it does not concern matrimonial matters.

[33] In our present case, the issue of jurisdiction has not been determined yet. As pointed out earlier, there is a pending hearing by the husband in England challenging the jurisdiction of the English Court set down for hearing in October 2014. The jurisdiction issue in Malaysia has been determined by the learned judge which is a subject of this appeal which we will deal with later. So for all intents and purposes, the issue of jurisdiction at this stage is far from settled.

[34] Under such circumstances, we are of the view that the 'clearly inappropriate forum' test should be used. We say so for this reason. The '*forum non conveniens*' test is more appropriate when we are dealing with a situation when the two competing forum have undoubted jurisdiction over the litigation. The *'forum*

non convenience' test presupposes that the two forums have such jurisdiction which in our case is not the case. The question of which is the more appropriate forum does not arise when one forum is not seized with jurisdiction. That we think is just plain common sense.

[35] Accordingly, it is beholden upon us to determine whether or not a court, in this case the Malaysian Court, is a 'clearly inappropriate forum' particularly in the context of a pending English proceedings by the wife. And to establish that, the burden of proof lies on the wife.

[36] We, after having heard respective submissions and perused with care the record of appeal, find that the wife had not discharged the burden of proving that the Malaysian Court is not "a clearly inappropriate forum" for the following reasons:

(i) We disagree with the contention of the wife that the fact she had filed her proceedings in England first is a major factor in the court's consideration. Learned counsel relies on the judgment of *Henry v. Henry (supra)* where the High Court of Australia said as follows:

> 35. It is *prima facie* vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue (48). And although there are cases in which it has been held that it is not *prima facie* vexatious, in the strict sense of that word, to bring proceedings in different countries (49), the problems which arise if the identical issue or the same controversy is to be litigated in different countries which have jurisdiction with respect to the matter are such, in our view, that, *prima facie*, the continuation of one or the other should be seen as vexatious or oppressive within the *Voth* sense of those words.

Learned counsel for the husband disputes such contention by referring the court to *Re S v. S (Matrimonial Proceedings Appropriate Forum)* [1997] 1 WLR 1200, where Wilson J applied Lord Goff's judgment in *De Dampierre v. de Dampierre* [1988] 1 AC 92 and held that nothing much turned on the fact that the wife had filed the English proceedings before the husband's New York petition. This is what he said:

> I do not think that much turns on that: indeed it would be unfortunate to encourage litigants to think that they can win advantage by racing ...

We adopt the approach of Wilson J as we are in agreement with his reasoning.

(ii) It is hardly disputed that the husband's business is mainly based in Malaysia with directorship in several public listed companies, namely, Metrojaya Berhad, MUI Properties Berhad, Pan Malaysian Industries Bhd and MUI Continental Insurance Bhd. Whatever business outside Malaysia relates in one way or another to his Malaysian business. At this juncture, we note that the proceedings before the two courts concern division of properties and maintenance of the wife only as all the children are now all over the age of 18. That being the case, the respondent will have to look to Malaysia to get what she wishes in terms of maintenance and properties.

(iii) We agree with learned counsel for the husband that a substantial amount of documentary evidence required to prove the wife's claim is situated in Malaysia. Similarly substantial number of witnesses concerning the financial affairs of the husband would also be from Malaysia.

(iv) The husband remains a Malaysian citizen and continues to reside at No. 10 Ukay Heights, Ampang.

(v) There is no assertion by the wife that proceedings in Malaysia will be oppressive to her in that she will be seriously and unfairly handicapped. In fact in the world of technology that we live in now, communication from any part of world is not an issue. One can say we now live in a borderless world. It is common nowadays that lawyers can easily obtain instructions from overseas clients *via* video conference with nominal costs through the internet. In this particular case, we have observed that both parties have engaged two sets of lawyers, one from England and one here. There is no mention by the wife that she does not have the financial ability to fund the litigation in Malaysia or that she is handicapped in giving instructions to her Malaysian lawyers.

[37] Accordingly we see no reason to disturb the learned judge's refusing to stay proceedings in encl. 1.

A **The Application Of The Husband To Proceed With Divorce Proceedings In Malaysia – Enclosure 1**

[38] The two main complaints of learned counsel for the wife are these. Firstly the learned judge erred when she determined the
B issues of jurisdiction of the Malaysian Court and domicile of the parties while considering encl. 6 when such determinations were not required at all to dispose off encl. 6. Secondly the learned judge erred when she determined the issues of jurisdiction of the Malaysian Court and domicile of the parties by way of affidavit
C evidence when there are substantial disputes arising therefrom.

[39] We find merit in the first complaint as we have demonstrated above that in determining encl. 6 there was no necessity to resolve the jurisdiction and domicile issues. With respect to the learned judge, the two enclosures should not have been heard
D together and we think by doing so, the learned judge may have been misled into believing that the resolution of the aforesaid issues are required bearing in mind that submissions by counsel on both enclosures were made simultaneously.

E **[40]** As for the second complaint, we also agree with the contention that the learned judge should have embarked on a full trial to determine the jurisdiction and domicile issues on the ground that the affidavit evidence give rise to many disputes of fact and law.

F

[41] But before we elaborate those disputes, we should make known our view that we, with respect, disagree with the contention of the learned counsel for the husband that the wife had submitted to the Malaysian jurisdiction by filing her application
G only pursuant to O. 28 r. 3B(2) Rules of Court 2012 which reads as follows:

> A Defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Malaysia is not the proper forum for the dispute shall, within twenty one
H days after the service of the originating summons and supporting affidavit or affidavits on him, apply to the Court for an order staying the proceedings.

I

It is learned counsel's contention that the application should have been filed pursuant also to O. 28 r. 3B(1) Rules of Court 2012 which states as follows:

> A Defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any irregularity in the originating summons or service thereof or in any order giving leave to serve the originating summons for the purpose of service or an any ground shall, within twenty one days after the service of the originating summons and supporting affidavit or affidavits on him apply to the Court for:
>
> (a) An Order setting aside the originating summons.

In view of this omission, it is submitted that the wife by not challenging jurisdiction as provided in O. 28 r. 3B(1) had submitted to it and the only issue left for determination is one of appropriate forum.

[42] With respect and even if a wrong rule had been used, the wife should not be penalised. Her intention not to submit to jurisdiction is made crystal clear in her affidavit dated 2 May 2013 where she stated as follow:

> I wish to make clear that I am not to be understood as having submitted to the jurisdiction of this Honourable Court in making the said application (paragraph 4).
>
> I contend that it is the English Courts which have jurisdiction to determine this matter and is the more appropriate forum to decide the issue of jurisdiction (paragraph 5).

With such clear declaration by the wife, it would not be proper for us to ignore it. In any event, O. 2 of the Rules of Court 2012 comes into play to save the day so to speak and in our view rightly so as the courts exist to ensure substantive justice is done. Further we cannot see how the husband is prejudiced or taken by surprise by the stand of the wife.

[43] With that we revert to the reasons why we say that a full trial is necessary to determine the issues of jurisdiction and domicile. From the outset, we wish to say that as a general rule unless it is crystal clear that the factual matrix required for determination of an issue or issues at hand is undisputed, the court must not resolve the dispute by affidavit evidence and must embark on a full trial with opportunities to both side to cross-examine the witnesses' averments in the affidavits.

[44] In *Syed Ibrahim Syed Abdul Rahman v. Liew Su Chin (F)* [1983] 1 LNS 45; [1984] 1 MLJ 160, 163, Lee Hun Hoe CJ (Borneo), when delivering the judgment of the former Federal Court, said:

> Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible.

[45] With respect to the learned judge, had she critically analysed the affidavit evidence, she would have in our view easily concluded that there is abundance of disputes between the averments of parties in their respective affidavits. We can do no better than refer to schedule 2 of the wife's outline submission dated 5 March 2014 where the learned counsel sets out the various disputes.

[46] There is dispute as to the reason why the parties moved to Australia with the husband saying that it was due to fear of kidnapping and education reasons, while the wife says that they migrated in 'reaction to the cultural shift which had taken place in Malaysia away from its Anglocentric roots'.

[47] There is also dispute as to which is the matrimonial home – Rossway Park Estate, Berkhamsted, Herfordshire, England or at No. 10 Ukay Heights, Ampang. The husband says that Rossway Park Estate is an investment, while the wife says that they had sometime in 2008 searched for a home in England and hence bought the Rossway Park Estate.

[48] As for seeking marriage counselling to save the marriage, there is also dispute as to the correct version of events. There is also the contention by the wife that she is not a Malaysian by virtue of her citizenship of Australia and Canada, even though she had not expressly renounced the same.

[49] The just mentioned disputes are part of the many disputes from the respective affidavit evidence and in our view the determination of those disputes is pivotal to the determination of the issues of jurisdiction and domicile. As stated earlier, the only way to resolve the disputes is simply to embark on a full trial.

[50] Apart from the factual disputes there are also few legal issues which merit comprehensive considerations by counsel and court. The one which is at the forefront is the submission of

learned counsel for the husband on the issue of domicile of the wife. Under s. 48 of the LRA, the court is seized with jurisdiction when the parties at the time of presentation of the petition are domiciled in Malaysia. Learned counsel for the husband had submitted that a woman is incapable of acquiring independent domicile while she remains married. Hence in this case, the wife's domicile follows the domicile of the husband which gives jurisdiction to the Malaysia Court under s. 48 of the LRA.

[51] Her submission is premised on s. 3(1) of the Civil Law Act 1956 which provides that the common law of England and rules of equity as administered in England on 7 April 1956 applies in West Malaysia. Learned counsel for the wife however submits that contention is misconceived and his reasons are these:

(i) Malaysian courts are entitled to create their own common law through the guidance of English decisions post 1956.

(ii) The ratification by the Malaysian Government of the Convention on the Elimination of All Forms of Discrimination in 1996 which accord women the same equity with men.

(iii) The application of the Bangalore Principles to the case at hand.

[52] The just mentioned issue in our view is of great importance as it would determine whether this country should continue what Lord Denning in *Gray* (*orse Formosa v. Formosa)* [1963] P. 259 EWCA calls 'the last barbaric relic of wife's servitude'. We are mindful of the fact that the learned judge in her judgment had sustained the just mentioned contention but since we are of the view that the learned judge should not have dealt with this issue during the hearing of encl. 6, we shall treat it as a premature ruling. We also wish to state that we express no views on it and leave it to the appropriate courts to determine this legal issue.

[53] There is also the legal issue of whether the LRA constitutes personal law and how it affects the dispute between the parties.

[54] It is for the reasons stated above that we find that the learned judge should not have deliberated on encl. 1 by way of the affidavit evidence but by way of a full trial where parties are subject to cross examination.

A

Conclusion

[55] For reasons stated above, we make the following orders:

(i) In respect of encl. 6, the appeal is dismissed.

B

(ii) The learned judge's finding on the issues of jurisdiction and domicile is set aside.

(iii) In respect of encl. 1, the appeal is allowed.

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(iv) That encl. 1 be remitted to High Court before another judge to be tried by way of a full trial.

(v) No order as to costs.

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